United States Department of Labor
Employees' Compensation Appeals Board

RICHARD E. SIMPSON, Appellant	)	
and	)	**Docket No. 04-14**
	)	**Issued: May 3, 2004**
DEPARTMENT OF THE NAVY, LONG BEACH NAVAL STATION, Long Beach, CA, Employer	)	

Appearances:
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 30, 2003 appellant, through his attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 30, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an attendant's allowance for the period July 17, 1983 through October 1, 1990; and (2) whether the Office properly denied appellant's request for an attendant's allowance for the period October 1, 1990 to July 12, 1998.

FACTUAL HISTORY

This case is before the Board for the second time. In the prior appeal, the Board reversed the Office's August 23, 1994 termination of appellant's compensation benefits effective May 30,

1993 on the grounds that he had no further employment-related disability.[1] The Board found that the medical evidence was insufficient to establish that appellant had no further residuals of his accepted conditions of cerebral concussion, dementia, cervical strain, lumbar strain, hemorrhagic gastritis, hypothyroidism and hearing loss causally related to his July 17, 1983 employment injury. The Office reinstated compensation following the Board's decision. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By letter dated December 17, 1998, appellant, through his attorney, requested an attendant's allowance from July 17, 1983 onwards. The attorney argued that appellant's mother had acted as his attendant from July 17, 1983 to April 1, 1986 and his wife had served as his attendant since April 1, 1986.

Regarding appellant's request for an attendant's allowance, the record contains a report dated September 26, 1983 from Dr. James H. Jen Kin, a psychiatrist, who related that he began treating appellant on September 19, 1983, diagnosed post-conversion syndrome with psychosis and noted that his "mother cares for all his physical and transportation needs." In a report dated January 19, 1984, Dr. Jen Kin diagnosed brain syndrome and opined that appellant was "not able to cope independently; only under the supervision of his mother."

Dr. William B. Head, Jr., a Board-certified neurologist and psychiatrist, performed a second opinion evaluation of appellant on April 10, 1984. Dr. Head diagnosed dementia, remitting, and found that he was disabled from employment. Dr. Head noted that appellant believed that he could grocery shop and travel without assistance on public transportation.

An Office medical adviser reviewed the evidence and, in a report dated November 7, 1985, opined that appellant had dementia due to his July 17, 1983 head injury. He indicated that the evidence regarding appellant's ability to perform activities of daily living conflicted. The Office medical adviser noted that appellant reportedly had his own bank account and paid his own bills.

In a report dated March 19, 1990, Dr. Jen Kin noted that appellant had "difficulty keeping track of when he had his insulin injections" and consequently "depend[ed] on his wife to keep track of the times when he takes his insulin." In an office visit note dated August 13, 1990, Dr. Jen Kin noted that "[appellant's] wife began working as a nurse's aide in order to provide financial resources to the family." In an office visit note dated August 27, 1990, Dr. Jen Kin opined that appellant was "basically unable to care for his immediate needs," and was "constantly in need of support and instruction by his wife and members of his family." On September 24, 1990 Dr. Jen Kin noted that appellant's wife provided his insulin injections and that his wife was "attempting to work on a part-time basis, in order to supplement their income. This does not seem to be an adequate solution due to the fact that [appellant] is not able to provide adequate supervision for his children." Dr. Jen Kin further noted on February 12, 1991 that appellant "remains dependent on his wife for getting accurate blood levels, as well as dispensing the accurate dosage of his insulin."[2]

[1] Docket No. 95-2844 (issued April 3, 1998).

[2] Dr. Anne Saravo, a clinical psychologist and Office referral physician, provided a report dated July 4, 1991.

The record contains part of a medical report dated April 13, 1992 from Dr. Milton E. Legume, a Board-certified orthopedic surgeon, who evaluated appellant regarding a motor vehicle accident on January 5, 1988. Dr. Legume diagnosed a cervical strain due to the motor vehicle accident and noted that appellant's "present complaints appear to be quite similar to complaints that were present before his auto[mobile] accident, at least in the area of his head and neck."

In a report dated January 15, 1993, Dr. Deo Martinez, a Board-certified internist, noted that appellant relied upon his wife to give him insulin twice daily and monitor his blood sugar level.

In a report dated March 23, 1993, Dr. William Hunt, a Board-certified family practitioner, related:

> "[Appellant's] organic brain syndrome is directly related to the injury which he suffered as a firefighter for the [employing establishment]. Presently, he has a significant problem with short-term and recent memory. This essentially makes him nonfunctional. As an adult, he is unable to manage his own medication and, in fact, is dependent upon his wife for his insulin administration, as well as testing of his blood sugars."

In a report dated May 6, 1993, Dr. Hunt opined that appellant was not able to "manage his daily activities due to an organic brain syndrome" and was "unable to care for other than his own basic needs."

Dr. Jen Kin, in a report dated January 11, 1994, noted that appellant was "unable to care for himself, and needs a great deal of reminding and directing from his family." Dr. Jen Kin completed an in-home supportive services form for the state social services department on March 14, 1994. He indicated that appellant required assistance for four hours per day in diet preparation, for behavioral problems, shopping/errands, transportation, medications and house cleaning. Dr. Martinez also completed an in-home supportive services form in March 1994. He opined that appellant required 15 minutes of assistance twice daily for insulin injections, 20 minutes of assistance 3 times a day for blood sugar monitoring, and 30 minutes of assistance 3 times a day for meal preparation. Dr. Martinez noted that appellant had diabetes, organic brain syndrome, hypertension and hypothyroidism.

In a medical report form for the state Aid to Families with Dependent Children program dated July 26, 1993, a physician found that appellant was permanently incapacitated due to organic brain syndrome, diabetes mellitus and hypothyroidism. The physician found that appellant required his wife to be in the home to take care of him.

The record contains letters of conservatorship dated August 4, 1993 appointing appellant's wife as his conservator. A notice of action dated March 29, 1994 from the state in-home supportive services found that appellant required 2.30 hours of assistance dressing, and

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Dr. Saravo provisionally diagnosed dementia and organic delusional disorder and to rule out malingering. She noted that appellant's ability to perform the activities of daily living had declined since 1984.

3.50 hours of assistance under the category of bathing, oral hygiene and grooming. In an order appointing probate conservatorship, a state court found that appellant was "unable properly to provide for his or her personal needs for physical health, food, clothing or shelter."

In December 1995, Dr. Jen Kin submitted a report noting that appellant was "incapable of providing for much of his physical needs." He submitted similar reports in April 1996 and March 1998.

In a report dated July 13, 1998, Dr. Jen Kin stated:

> "[Appellant] continues to be agitated, periodically confused, associations loose, affect inappropriate, [and] periodically a management problem. He has difficulty with hearing, difficulty with diabetes [and] difficulty with management of his medical complications independently. [He] constantly needs someone around to prepare his food properly, [and] needs someone around for his actual aide to daily living, such as hygiene, washing [and] clothing. [He] [n]eeds someone to assist in showering, difficulty with insulin, constantly needing help for regulation of dosage, blood sugar and food intake. [Appellant] is confused [and has] difficulty with his daily medication scheduling. Periodically [he] would become markedly confused, leave his place of residence [and] get lost in traffic. Basically [he] has to be in attendance with a care giver at all times."

On January 10, 1999 the Office informed appellant's attorney that the new regulations provided that the payment for attendant services would no longer be made directly to a claimant. In a response dated May 4, 1999, appellant's attorney noted that, as his request was made in December 1998, prior to the effective date of the new regulations, the claim should be adjudicated under the old regulations. He further submitted evidence relevant to the qualifications of appellant's wife to act as his attendant. Appellant's attorney noted that from 1988 to 1989 appellant's wife received money from the county to care for a blind, diabetic woman and from May 1993 through 1994 appellant's wife received minimum wage from the county to care for appellant. He further indicated that from 1986 to 1989 appellant's wife received minimum wage to care for appellant's brother, who had cerebral palsy.[3]

An Office medical adviser reviewed the evidence on March 21, 2000 and found that appellant's attending physician should clarify what assistance was necessary due to the accepted conditions and discuss the days and hours an attendant would be needed, as well as "the date the attendant was first needed."

In a letter dated March 21, 2000, the Office requested that Dr. Jen Kin complete an enclosed form regarding the type and extent of care required for appellant. The Office noted that

[3] The Office, in an internal memorandum, noted that appellant's request should be evaluated under the regulations in effect prior to January 1, 1999 and cited FECA Bulletin No. 99-09 (issued January 4, 1999) which is included in the record.

it had not accepted appellant's claim for diabetes. In a response received April 12, 2000, Dr. Jen Kin related that appellant needed assistance for travel, walking and bathing.[4]

An Office medical adviser reviewed Dr. Jen Kin's findings and opined, in a report dated April 13, 2000, that an attendant for four hours per day seven days per week was "reasonable, going back to the date of [the] request, given that there has been no material change in the claimant's condition."

In a memorandum dated April 17, 2000, the Office found that appellant's wife was entitled to an attendant's allowance for four hours per day seven days per week beginning December 17, 1998. The Office noted that activities such as monitoring and administering appellant's insulin were not covered services.

On May 12, 2000 appellant's attorney contested the Office's finding that appellant was not entitled to an attendant's allowance prior to December 16, 1998 and requested a formal decision on the issue. In a letter dated October 5, 2000, the Office notified appellant's attorney that it had approved his entitlement to an attendant's allowance from June 13 to December 16, 1998. The Office informed him that he should submit a medical report documenting appellant's need for attendant care due to his accepted employment injuries for the period July 17, 1983 through July 12, 1998.[5]

In a letter dated October 19, 2000, appellant's attorney noted that appellant's need for care arose due to his accepted condition of dementia and requested an attendant's allowance from July 17, 1983 to July 12, 1998. In a letter dated March 14, 2001, appellant's attorney requested a response from the Office on the status of his request.

In a letter dated May 1, 2001, the Office reviewed the evidence and requested the submission of a reasoned medical report addressing appellant's need for assistance in personal matters such as feeding and bathing for the period in question and also addressing his nonemployment-related 1988 motor vehicle accident. The Office informed counsel that appellant's daily need for insulin was not covered by an attendant's allowance. In a February 5, 2002 response, he again requested a formal decision, noting that Dr. Legume described the effects of appellant's motor vehicle accident in his April 13, 1992 report.

By decision dated February 28, 2002, the Office denied appellant's claim for an attendant's allowance from July 17, 1983 through July 12, 1998 on the grounds that the medical evidence was insufficient to establish that he was unable to care for his personal needs during this time period. The Office noted appellant's attending physician, Dr. Jen Kin, had retired.

On March 27, 2002 appellant, through his attorney, requested a hearing. At the hearing held on July 25, 2002, appellant's wife testified that from 1986 onwards she had to assist appellant with his bath and picking out his clothes. She further stated that she gave him his

[4] It is not clear whether Dr. Jen Kin indicated that appellant required assistance 24 hours per day or 2 to 4 hours per day.

[5] The Office noted that Dr. Legume, in his April 13, 1992 report, did not document the need for an attendant. The Office further noted that it had not received all of Dr. Legume's report.

medication and constantly watched over him. Other family members testified that appellant was incapable of bathing or dressing himself.

In a decision dated October 30, 2002, the hearing representative affirmed the Office's February 28, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8111(a) of the Federal Employees' Compensation Act[6] as applicable to the period in question,[7] provided:

> "The Secretary of Labor may pay an employee who has been awarded compensation an additional sum of no more than $500.00 a month, as the Secretary considers necessary, when the Secretary finds that the service of an attendant is necessary constantly because the employee is totally blind, or has lost the use of both hands or both feet, or is paralyzed and unable to walk, or because of other disability resulting from the injury making him so helpless as to require constant attendance."

Prior to January 4, 1999, the controlling regulation regarding an attendant allowance at 20 C.F.R. § 10.305 did not require personal care services to be provided by a licensed practical nurse, home health aid or similarly trained individual.

ANALYSIS -- ISSUE 1

Regarding appellant's claim for an attendant's allowance for the period July 17, 1983 until October 1, 1990, the Office's procedure manual, as applicable for the period in question,[8] provided:

> "Payment may not be made to a dependent relative acting as an attendant or practical nurse unless the relative is required to terminate or is prevented from securing gainful employment outside of the home to provide the services to the injured employee."[9]

Thus, in order for appellant's wife or mother to be entitled to an attendant's allowance, it must be established that appellant's need for an allowance prevented them from working. In this case, the evidence is not sufficient to show that, at any time from July 17, 1983 to October 1, 1990, appellant's wife or mother terminated or were unable to secure employment in order to act

[6] 5 U.S.C. § 8111(a).

[7] This section was amended effective October 1, 1990 to increase the maximum monthly attendant's allowance to $1,500.00.

[8] This provision was deleted from the Office's procedure manual in October 1990.

[9] Federal (FECA) Procedure Manual, Part 3 -- *Medical, Examinations, Treatment and Related Services*, Chapter 3.400.10(a) (October 1978).

as appellant's attendant. There is also no indication in the record that appellant paid or incurred any debt or obligation to his relatives as a result of care provided by these persons.[10]

Regarding appellant's wife working outside the home, in an office visit note dated August 13, 1990, Dr. Jen Kin indicated that appellant's wife was working as a nurses' aide in order to increase their income. Dr. Jen Kin further noted, on September 24, 1990, that appellant's wife working outside the home was a problem due to appellant's inability to properly supervise his children. The record indicates that, during the period in question, appellant's wife worked outside the home from 1988 to 1989 as an attendant paid by the county and worked inside the home from 1986 to 1989 as an attendant for appellant's brother. Therefore, the evidence does not establish that appellant's wife ceased working to care for appellant at any time from July 17, 1983 to October 1, 1990.

As the record contains no evidence that appellant paid or incurred a debt or obligation to any person for whom an attendant's allowance was claimed and there is no evidence that appellant's relatives terminated or were unable to secure employment in order to act as appellant's attendant, the Office acted properly in denying payment of an attendant's allowance for the period July 17, 1983 to October 1, 1990.

LEGAL PRECEDENT -- ISSUE 2

The Act provides for an attendant's allowance under section 8111(a), which states:

> "The Secretary of Labor may pay an employee who has been awarded compensation an additional sum of not more than $1,500.00 a month, as the Secretary considers necessary, when the Secretary finds that the service of an attendant is necessary constantly because the employee is totally blind, or has lost the use of both hands or both feet, or is paralyzed and unable to walk, or because of other disability resulting from the injury making him so helpless as to require constant attendance."[11]

Under this provision, the Office may pay an attendant's allowance upon a finding that a claimant is so helpless that he is in need of constant care. The claimant is not required to need around-the-clock care. He has only to have a continually recurring need for assistance in personal matters. The attendant's allowance, however, is not intended to pay an attendant for performance of domestic and housekeeping chores such as cooking, cleaning, doing the laundry or providing transportation services. It is intended to pay an attendant for assisting a claimant in his personal needs such as dressing, bathing or using the toilet.[12] Additionally, a claimant bears the burden of proof to establish by competent medical evidence that he requires attendant care

[10] *See George L. Littleton*, 33 ECAB 904 (1982) (finding that the Office acted properly in not granting an attendant's allowance for a period during which the claimant did not pay his sister or incur any debt or obligation as a result of his need for attendant's care).

[11] 5 U.S.C. § 8111(a).

[12] *Nowling D. Ward*, 50 ECAB 496 (1999).

within the meaning of the Act.[13] An attendant's allowance is not granted simply upon the request of a disabled employee or upon request of his physicians. The need for attendant care must be established by rationalized medical opinion evidence.[14]

ANALYSIS -- ISSUE 2

Regarding appellant's claim for an attendant's allowance for the period October 1, 1990 to July 12, 1998, the record contains an office visit note from Dr. Jen Kin dated August 27, 1990, who indicated that appellant was "unable to care for his immediate needs." In a report dated February 12, 1991, Dr. Jen Kin indicated that appellant was "dependent on his wife for getting accurate blood levels, as well as dispensing the accurate dosage of his insulin." Dr. Martinez submitted a report dated January 15, 1993 in which he found that appellant needed his wife's assistance for his insulin injections and blood sugar monitoring. In a report dated March 23, 1993, Dr. Hunt related that appellant was not functional due to organic brain syndrome as a result of his employment injury. He noted that appellant was unable to administer his medication or test his blood sugar without his wife.

The record further contains form reports dated March 1994 from Dr. Jen Kin and Dr. Martinez prepared for the state social services department. Dr. Jen Kin found that appellant required four hours per day of assistance in diet preparation, behavioral management, shopping, transportation, medications and house cleaning. Dr. Martinez found that appellant required 30 minutes per day of assistance with his insulin injections and 60 minutes per day of assistance for blood sugar monitoring.

In a medical report form for the state Aid to Families with Dependent Children program dated July 26, 1993, a physician found that appellant was permanently incapacitated due to organic brain syndrome, diabetes mellitus and hypothyroidism and required his wife to be in the home to take care of him. The record further contains a state support services finding that appellant required 2.30 hours of assistance dressing and 3.50 total hours of assistance with bathing and grooming. In December 1995, Dr. Jen Kin found that appellant was "incapable of providing for much of his physical needs."

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[15]

Contrary to the Office's finding, appellant's need for assistance in receiving insulin injections and blood sugar monitoring, if due to an accepted condition, is covered under the Act as a personal service.[16] Although, in this regard, the medical evidence is not sufficient to meet

[13] *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

[14] *Id*.

[15] *William J. Cantrell*, 34 ECAB 1223 (1983).

[16] *See generally Daniel W. Polansky*, Docket No. 98-2030 (issued September 18, 2000) (where the Board remanded the case for further development after noting that appellant's attending physician found that he required

appellant's burden of proof, it raises an uncontroverted inference of appellant's need for an attendant for the administration of medication during the period in question and is sufficient to require further development of the case record by the Office.[17] The Board notes that, although his diabetes is not an accepted condition, his accepted dementia may prevent appellant from attending to his required medication. On remand, the Office should obtain a report from one of appellant's physicians addressing whether appellant required an attendant at any time between October 1, 1990 and July 13, 1998 due to the effects of his employment injury and, if so, the types of services rendered and time required.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an attendant's allowance for the period July 17, 1983 through October 1, 1990.

The Board finds that the Office improperly denied appellant's request for an attendant's allowance for the period October 1, 1990 to July 12, 1998.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 30, 2002 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 3, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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assistance in "personal needs such as bathing, dressing and taking medication").

[17] *John J. Carlone*, 43 ECAB 354 (1989).